84-797

NO.

Office - Supreme Court, U.S.
FILED
SEP 14 1984
ALEXANDER L. STEVAS
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1984

HENRY J. BENNETT, JR.
PETITIONER

VERSUS

CITY OF SLIDELL, GERRY E. HINTON, B.E. McDANEIL, NUNZIO GIORDANO AND PATRICK BERRIGAN, DEFENDANTS-RESPNDENTS

AND

FRANK M. CUSIMANO, KEITH S. INGRAM, AND CENTRAL LOUISIANA ELECTRIC COMPANY
DEFENDANTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID W. OESTREICHER, II
OESTREICHER, WHALEN & HACKETT
307 Exchange Alley
New Orleans, Louisiana 70130
(504)529-7666

FERNANDO J. ESTOPINAL, III
29 Treasure Island Drive
Slidell, Louisiana 70458

COUNSEL FOR PETITIONER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

8618

QUESTIONS PRESENTED FOR REVIEW

Whether a municipality may be held liable for damages under 42 U.S.C. §1983 for the unequal and, thus unconstitutional enforcement of its facially valid ordinance by an appointed official to whom the city has delegated final authority for interpretation and enforcement?

TABLE OF CONTENTS

Questions presented for Review.....i

Table of Contents.....ii

Table of Authorities.....iii

Opinions Below.....2

Jurisdiction.....2

Statute Involved.....3

Statement of the Case.....4

Existence of Jurisdiction Below.....14

Reasons for Granting the Writ.....15

Conclusion.....27

Certificate of Service.....29

Appendix A - Opinion of the United States District Court for the Eastern District of Louisiana.....A-1

Appendix B - Panel Opinion of the United States Court of Appeals for the Fifth Circuit.....A-7

Appendix C - Original Rehearing En Banc Opinion of the United States District Court of Appeals for the.....A-18

Appendix D - Petition for Rehearing En Banc Opinion of the United States Court of Appeals for the Fifth Circuit.....A-43

Appendix E - Statutes and Ordinances Involved.....A-47

TABLE OF AUTHORITIES

CASE:

Bowen v. Watkins,
669 F.2d 979 (5th Cir. 1982).....25

Burt v. Abel,
565 F.2d 391 (5th Cir. 1978).....23

Familias Unidas v. Briscoe,
619 F.2d 391 (5th Cir. 1980).....24

Monell v. Dept. of Social Services
of City of New York,
436 U.S. 659, 98 S.Ct. 2018,
56 L.Ed.....10,15,16,17
611 (1978.....21,22,23,27

Monroe v. Pape,,
365 U.S. 167, 81 S.Ct. 473
1961).....10

Owen v. City of Independence
445 U.S. 622, 100 S.Ct. 1398,
63 L.Ed 673 (1980).....22

Turpin v. Mailet,
619 F.2d 196 (2d Cir. 1980).....23

Van Ooteghem v. Gray,
628 F.2d 488 (5th Cir. 1980)....24,25

STATUTES:

28 U.S.C. §1254(1).....3

28 U.S.C. §1343(3).....14

42 U.S.C. §1983.....9,10,14,15
.....16,17,18,20
.....21,22,23,26,27

42 U.S.C. §1985.....10,14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO.

HENRY J. BENNETT, JR.
PETITIONER

VERSUS

CITY OF SLIDELL, ET AL
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, HENRY J. BENNETT, JR., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 9, 1984.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Louisiana is reported at 518 F.Supp. 657. The panel opinion of the Court of Appeals is reported at 697 F.2d 657. The original rehearing en banc opinion of the Court of Appeals is reported at 728 F.2d 762. The opinion of the Court of Appeals not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in a panel opinion was entered on February 7, 1983. On rehearing en banc, the Court of Appeals judgment was entered on April 2, 1984. A timely petition for rehearing was

denied on July 9, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND ORDINANCES INVOLVED

SEE APPENDIX - E

STATEMENT OF THE CASE

From 1972 until May, 1975, Petitioner, HENRY J. BENNETT, JR., operated a small but successful lounge in Slidell, Louisiana, known as "Fooser's Den" (R. 113). Shortly thereafter, BENNETT leased, with an option to buy, the premises located at 3745 Pontchartrain Drive in Slidell, Louisiana (R. at 231-232; 117; 307). BENNETT planned to renovate the property and then open another lounge to be known as "Club Rustique" (R. at 116-117).

After the lease was signed and renovation had begun, an adjoining property owner, Slidell City Auditor, JOHN COERVER, informed BENNETT that he intended to use his considerable influence in the City to oppose the opening of the lounge

(R. at 120; 168; 309). On June 11, 1975, BENNETT applied for a building permit (R. at 392). BILL DUGAS, the city building official initially denied BENNETT'S application until BENNETT submitted building plans, including a proposed parking area (R. at 311). The building permit was subsequently issued on June 13, 1975. (R. at 393).

BENNETT'S primary concern was to facilitate the opening of the new lounge and retain as many former customers of "Fooser's Den" as possible, but the delays he encountered forced him to postpone the opening date until July 4, 1975 (R. at 114). This goal proved unattainable, and BENNETT was not able to apply for the liquor license until July 7, 1975 (R. at 312).

Although the City Council met twice

during the interim and BENNETT'S application conformed to law (R. at 38; 42), no action was taken by the Slidell City Council until August 12, 1975. In this interim, the council received a letter from COERVER objecting to BENNETT'S application. SEE APPENDIX B. p. A-5. FOOTNOTE 3. The council refused to issue the license by a vote of 3-1, (R. at 313 a, b), having split on the question of whether a license could issue to a person not holding a certificate of occupancy and having agreed to seek the City Attorney's advice (R. at 290).

On August 21, 1975, COERVER again wrote to the City Council, this time objecting to issuance of an occupancy permit to BENNETT. SEE APPENDIX B. p. A-6.

On August 22, 1975, BENNETT filed for

a writ of mandamus to compel the CITY OF SLIDELL to issue his properly filed liquor license application. (R. at 149-150). A Show Cause hearing was scheduled in this action for September 23, 1975. On September 23, 1975, the City Council finally issued the license to BENNETT at a special meeting (R. at 87-92). BENNETT'S efforts to secure the occupancy permit continued to be unsuccessful.

BENNETT purchased shells to pave his parking lot with the understanding that he would be allowed to use them for a period of time as did other businesses in the City of Slidell (R. at 319).

Although other similar businesses were allowed to operate without paved parking lots (R. at 281-282), City Building Official DUGAS informed BENNETT that he would require BENNETT to comply

strictly with the building regulations (R. at 101; 322; 380-383).

BENNETT began to encounter financing problems as a result of these delays. (R. at 115). BENNETT'S ability to secure credit was seriously impaired (R. 135; 333); he was forced to expend legal fees in seeking the issuance of a writ of mandamus (R. at 338), in addition to the expenses for intitially covering the parking lot with shells (R. at 334).

Further, BENNETT'S termporary electrical power was discontinued on November 19, 1975, for approximately one week by Central Louisiana Electric Company (CLECO) (R. at 326). This action was taken pursuant to the orders of DUGAS and the City Attorney BERRIGAN who communicated with CLECO and requested that BENNETT'S temporary electricity at 3745

Pontchartrain Drive be shut off without affording BENNETT an opportunity to explain his action. (R. at 46-47; 49).

Out of the total number of 288 applications for liquor permits in 1974 and 1975, BENNETT was the only one who received this type of treatment (R. at 46).

On April 1, 1976, BENNETT initiated the instant suit under 42 U.S.C. §1983 and 1985, against the CITY OF SLIDELL, CITY COUNCIL, GERRY HINTON, B.E. McDANIEL, NUNZIO GIORDANO and MAYOR FRANK CUSIMANO, City Attorney PATRICK J. BERRIGAN, Chief Administrative Officer, KEITH S. INGRAM, and the CENTRAL LOUISIANA ELECTRIC COMPANY INC. (CLECO).

In his complaint, BENNETT alleged that his constitutional right to property had been abridged under color of state law

through the actions of the named Defendants during the course of his attempts to obtain a liquor license and open a bar in the CITY OF SLIDELL.

On September 29, 1976, the CITY OF SLIDELL'S Motion to Dismiss for failure to state a claim under 42 U.S.C. §1983 and 42 U.S.C. §1985, and under the authority of Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 51 Ed.2d 492 (1961), was granted.

On January 12, 1979, Plaintiff moved to dismiss CENTRAL LOUISIANA ELECTRIC COMPANY, INC. from the proceeding. On January 15, 1979, an Order was entered to that effect.

On June 26, 1979, Plaintiff filed a Motion to Reinstate the CITY OF SLIDELL as a Defendant. Pursuant to Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 985 Ct. 2018, 56

L.Ed.2d 611 (1978). On July 18, 1979, Plaintiff's Motion was granted, and the CITY OF SLIDELL was reinstated as a Defendant.

The case was tried before a jury with the Honorable George Arceneaux, Jr. presiding on December 18 and 19, 1980. The jury returned a judgment against the Defendants, the CITY OF SLIDELL, GERRY HINTON, B. E. McDANIEL, NUNZIO GIORDANO and PATRICK BERRIGAN. Compensatory damages were assessed at $20,000.00 against the CITY OF SLIDELL and $1,000.00 against each of the individual Defendants. The jury found that FRANK CUSIMANO and KEITH INGRAM had not violated Plaintiff's constitutional rights under color of state law. The jury further failed to find a conspiracy among the Defendants.

Following the jury verdict,

Defendants moved for a judgment notwithstanding the verdict, a new trial, and a remittitur. On April 3, 1981, Defendants' Motions were denied, and on April 8, 1981, a final judgment against Defendants was entered.

Each of the Defendants cast in judgment appealed to the Fifth Circuit of Appeals and on February 7, 1983, a panel of the Court of Appeals upheld the liability of the CITY OF SLIDELL and BERRIGAN but reversed as to Council members HINTON, McDANIEL and GIORDANO. SEE APPENDIX B. BERRIGAN sought a rehearing en banc, which, on May 23, 1983, was granted.

Under Fifth Circuit Local Rule 17, the effect of granting a rehearing en banc is to vacate the previous opinion. Thus, the appeals of SLIDELL, BERRIGAN, HINTON

McDANIEL and GIORDANO were again before the court. On April 2, 1984, the Court on rehearing en banc reinstated the panel holding on all issues except that of the liability of the CITY OF SLIDELL. SEE APPENDIX C.

Petitioner, BENNETT, filed a Petition for Rehearing with the Court of Appeals. On July 9, 1984, the Court of Appeals reaffirmed the holding of its original opinion, that a municipality is liable under section 1983 for deprivation of rights protected by the Constitution or federal laws only if the deprivation is inflicted pursuant to official policy, and denied the Petition for Rehearing. SEE APPENDIX D.

EXISTENCE OF JURISDICTION BELOW

The District Court for the Eastern District of Louisiana had jurisdiction over this Civil Rights under 28 U.S.C. 1343; 42 U.S.C. 1983; and 42 U.S.C. 1985.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE SUPREME COURT REGARDING THE PROPER INTERPRETATION OF MUNICIPAL LIABILITY UNDER 42 U.S.C. §1983.

The difficulty of determining municipal liability under 42 U.S.C. §1983 is an issue that should be addressed promptly. A definitive and proper resolution of this question will shed a guiding light on every §1983 case presently being litigated.

In the Court a quo, it was held that the actions of City Building Inspector DUGAS and city Attorney BERRIGAN, within the context of the facts of this case, were not acts of those who "may fairly be said to represent official policy". This is a restrictive view of Monell v. Department of Social Services, 435 U.S. 158, 98 S.Ct. 2018, 566 Ed.2d 611 (1978) and one which effectively immunizes

municipalities from §1983 liability for the unconstitutional actions of its appointed officials.

In Monell supra, the Supreme Court ruled that a City was liable for monetary damages by maintaining an official policy of discriminating against pregnant employees. The Court, speaking through Justice Brennan articulated the new standard of municipal liability under §1983: "...[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983". Monell, supra, 436 U.S. at 694, 98 S.Ct at 2037.

In the case a quo, the United States Court of Appeals for the Fifth Circuit

acknowledged that official policy can be made by a city official pursuant to delegated authority, but the Court erroneously relieved a municipality of §1983 liability whenever its official policy, as set forth in a written ordinance or as formally adopted by the City's law makers, is facially constitutional. In essence, the Court has held that any action by an appointed official, inconsistent with the City's written ordinance, is an aberrant act attributable only to that official, the meaning of Monell, supra. Under this ruling, municipalities, cities and governments are unjustly insulated from any civil rights laws. For instance in the case of someone beaten by a city employee, a city may not be held liable unless the victim can show that the

employee's actions were official municipal policy. This result is wholly inconsistent with Monell's mandate that a municipality be subjected to §1983 liability for more than the mere written words of its ordinances.

The Court of Appeals held that a City is responsible for the unconstitutional enforcement of a facially constitutional ordinance only when it is established that the aberrant conduct was so notorious that it must be assumed that the city lawmakers tacitly approved the wrongful act. That proposition emasculates Monell, supra. Corporate bodies, such as municipalities, act only through natural persons. It is through the actions of such persons that laws are promulagated and policies are formally articulated. And it is only through the actions of such persons that

official power and authority may be exercised and official policies and customs may be enforced. Thus, municipal liability as defined by Monell, supra should extend not only to a formally ordained unconstitutional policy but to the acts of those individuals who are clothed with the city's power and authority in a given situation.

BILL DUGAS, the City Building Inspector, was chief of the office of Permits and Inspections. He was appointed by elected city officials and was delegated specific enforcement authority by the Zoning Ordinance of the City of Slidell. SEE APPENDIX C p. A-20.

DUGAS, for instance, was empowered to enforce the surfacing of off-street parking facilities for businesses. Section 4.1 of the zoning ordinances

requires that such parking lots "be surfaced with a minimum of four (4) inches of concrete or similar all-weather surface". DUGAS, however, allowed several other business establishments in Slidell to surface their parking lots with shells. Both the trial judge and jury held that DUGAS declined to authorize BENNETT'S use of a shell surface because of JOHN COERVER'S intervention. Although the zoning ordinance provides for administrative review of DUGAS' interpretation and enforcement of the ordinance, the record reflects that DUGAS' decisions to grant or deny occupancy permits were never challenged.

The Court of Appeals shields the CITY OF SLIDELL from §1983 liability for DUGAS' unconstitutional enforcement of the zoning ordinances on the ground that elected city

officials did not authorize DUGAS to make official city policy. But, by formal action of the City Council, he was designated the primary authority to interpret and enforce the zoning ordinance. In fact, under the ordinance, DUGAS was the sole repository of city authority to grant or deny occupancy permits. DUGAS' interpretation and enforcement of the ordinance therefore constituted the execution of official city policy. DUGAS' decisions were final; they were the alpha and omega of the interpretation and execution of the city's official policy in this area. DUGAS' unequal enforcement of the Slidell Zoning Ordinance fits precisely within Monell's prescription for §1983 municipal liability where the "execution of a government's policy...by those whose edicts or acts may

fairly be said to represent official policy, inflicts the injury". Monell, supra, 436 U.S. at 694, 98 S.Ct. at 2037. The mere fact that the officials acts are inconsistent with the City's facially constitutional ordinance cannot and should not be sufficient to immunize the city from §1983 liability under Monell.

The Court of Appeals decision is also in conflict with the Supreme Court's decision in Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed 673 (1980), which held that a city may be held accountable under Monell for the unconstitutional acts of appointed officials even if the officials enjoy individual immunity from §1983 liability. In Owen, supra, the Court said that neither history nor policy supported a construction of §1983 that would allow a

a municipality to assert the good faith of its officers or agents as a defense to liability for damages. Owen, supra, 445 U.S. at 638, 657, 100 S.Ct at 1409, 1418.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 42 U.S.C., §1983.

Since the Supreme Court's ruling in Monell, numerous Courts of Appeals, including the Fifth Circuit, have sought to delineate the contours of Monell, supra, with varying conclusions. Burt v. Abel, 585 F.2d 613 (4th Cir. 1978), held that under Monell, a 1983 claim could be grounded on "an official action of that municipality" rather than on a policy or custom. In Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980), cert. denied 449 U.S. 1016, 101 S.Ct 577, 66 L.Ed.2d 475 (1980), the Court stated that a policy of

acquiescence in illegal conduct could not ordinarily be inferred from a single incident of illegality. In Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980), the Fifth Circuit explained some of the contours of Monell's, supra "official policy" requirement by stating that in those areas in which an official is the final authority, his official conduct and decisions must necessarily be considered to represent official policy.

This interpretation of county-municipal liability for its official policies or customs was further illuminated by the Fifth Circuit in Van Ooteghem v. Gray, 628 F.2d 488, 494-95 (5th Cir., 1980):

> Moreover, in the inevitable bureaucracy of our complex society, the policy decisions need not always emanate from apophthegm plains in the heirarchy, but often may have their

> source in subordinate realms. A county must be held accountable for more than its officially-codified policies; in cases where the written law of a local government entity vests unbridled authority in certain areas in an individual, his decisions become the controlling law and official policy of the entity.

A thorough discussion of municipal liability occurred in Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982), in which the Court stated:

> When an official has final authority in a matter involving the selection of goals or of means of achieving goals, his choices represent governmental policy...If a higher official has the power to overrule a decision but as a practical matter never does so, the decisionmaker may represent the effective final authority on the question.

Both Van Ooteghem and Bowen, supra are supportive of the conclusion that the City of Slidell is liable for DUGAS' unconstitutional acts. But, the Fifth Circuit has disregarded these earlier decisions and erroneously ruled that the

CITY OF SLIDELL could not be held liable for the intentional delays in issuance of BENNETT'S liquor license and occupancy permit and termination of his electric services at the request of the City Attorney and Building Inspector. It is evident from the above decisions that direct conflicts exist as to when a municipality may be held accountable for damages under §1983 for the unequal and, thus unconstitutional, enforcement of its facially valid ordinance by an appointed official to whom the City has delegated final authority for interpretation and enforcement.

These conflicts justify the granting of certiorari to review the judgment below.

CONCLUSION

Thus, in the six years since this Court's opinion in Monell, supra, three Courts of Appeals have reached conflicting resolutions regarding the problem of determining municipal liability when execution of its policy, express or implied, violates 42 U.S.C. §1983.

It is hoped that, notwithstanding its heavy docket, this Court will grant the present petition to complete its resolution of this problem.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

DAVID W. OESTREICHER, II
OESTREICHER, WHALEN & HACKETT
307 Exchange Alley
New Orleans, Louisiana 70130
(504)529-7666

FERNANDO J. ESTOPINAL, III
ATTORNEY AT LAW
29 Treasure Island Drive
Slidell, Louisiana 70458

CERTIFICATE OF SERVICE

I certify that I am a member of the Bar of this Court representing the Petitioner herein and that three copies of the above petition for writ of certiorari to the Fifth Circuit Court of Appeals were served upon counsel for the respondent, first class postage prepaid, addressed to his office in New Orleans, Louisiana this _____ day of September, 1984.

_____
DAVID W. OESTREICHER, II

APPENDIX A

HENRY J. BENNETT, JR.

VERSUS

CITY OF SLIDELL, ET AL

Civ. A. NO. 76-977.

United States District Court,
E. D. Louisiana.

April 3, 1981.

City council and officials denied Plaintiff's application for a liquor license and his request for an occupancy permit, and he brought a civil rights action alleging that he had suffered a deprivation of his constitutional rights to due process and equal protection. Subsequent to a trial by jury in which city and certain officials were found liable to Plaintiff, the city moved for a directed verdict or, in the alternative, for a new trial. The remaining Defendants found liable moved for judgment notwithstanding the verdict or, alternatively, for new trial and/or remittitur. The District Court, Arceneaux, J., held that: (1) uncontradicted testimony indicated that occupancy license requirement of a paved parking area was enforced only upon receipt of a complaint that no such parking existed, and there was also testimony that decisions of permit officer to issue or deny an occupancy permit were never questioned by city council; thus,

the denial of plaintiff's occupancy permit occurred pursuant to acts which could "fairly be said to represent official policy," rendering the city a "person" that could be held liable in civil rights action brought by the applicant, and (2) as plaintiff's case against city was not based on allegations that city employed a tort-feasor, the district court was not obliged to instruct the jury on city's nonliability under a respondeat superior theory.

Judgment in accordance with opinion.

Oestreicher & Whalen, David W. Oestreicher, II, New Orleans, La., for plaintiff.

Edmund W. Golden and Lawrence D. Wiedemann, Wiedemann & Fransen, New Orleans, La., for defendants Hinton, McDaniel, Cusimano, Giordano, Berrigan and Ingram.

Lloyd R. Walters, Slidell, La., for defendant City of Slidell.

ARCENEAUX, District Judge.

This Section 1983 action arose from plaintiff's claim that he suffered a deprivation of his constitutional rights to due process and equal protection. This deprivation allegedly arose as a result of the denial, by the Slidell City Council and city officials, of both plaintiff's application for a liquor license and his request for an occupancy permit. Plaintiff also alleged that the defendants had conspired to deny his permit application.

At the trial by jury, the City of Slidell, Gerry Hinton, B. E. McDaniel, Nunzio Giordano and Patrick Berrigan were found liable to the plaintiff. The two remaining defendants, Frank Cusimano and Keith Ingram, were found not liable. The jury also found that no conspiracy existed among the defendants.

Subsequent to trial, defendant in the City of Slidell moved that this Court grant its motion for directed verdict or, in the alternative, grant it a new trial. The remaining defendants found liable to plaintiff moved for a judgment notwithstanding the verdict, or alternatively, for a new trial and/or remittitur. Counsel for plaintiff has also moved the Court for an award of attorney's fees.

After carefully reviewing the testimony and all memoranda of law, IT IS ORDERED that:

1. The City of Slidell's motion for directed verdict, or alternatively for a new trial, is DENIED.

2. The motion for judgment notwithstanding the verdict, or alternatively, for a new trial and/or remittitur filed by the remaining defendants found liable to plaintiff is also DENIED.

3. Plaintiff's motion for attorney's fees is referred for hearing to the magistrate in accordance with Rule 53(b). The magistrate will make Findings and Recommendations to this Court, with due attention to those factors set forth in

Johnson v. Ga. Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

LAW

The City of Slidell alleges several alternative grounds as bases for its motion. The only ground which the Court will address is the allegation that the Court erred in failing to instruct the jury that the City of Slidell could be found liable only should plaintiff prove that action pursuant to official municipal policy caused the alleged civil rights violation. This instruction would arise, the City contends, under the holding of Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

This landmark decision holds that a municipality may be considered a "person" for §1983 purposes, provided that the complained-of violation arose from the implementation or execution of a policy statement, ordinance, regulation or decision officially adopted and promulgated by the municipality's officers. The case goes on to state that:

> Local governments, like every other §1983 "person", by the very terms of the statute, may be sued for constitutional deprivation visited pursuant to governmental "custom" even though such custom has not received formal approval through the body's official decision making channels...It is when execution of a

> government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983. Monell, supra 98 S.Ct. at 2036, 2038.

[1] There was uncontradicted testimony from several witnesses indicating that the occupancy license requirement of a paved parking area was enforced only upon receipt of a complaint that no such parking existed. This testimony established to this court's satisfaction that local law was unequally applied pursuant to municipal "custom or usage". Additionally, there was also testimony to the effect that the decisions of Permit Officer Dugas to issue or deny occupancy permits were never questioned by the City Council members. The denial, then, of plaintiff's occupancy permit, occurred pursuant to acts which "may fairly be said to represent official policy."

[2] The City also alleged error as a result of this Court's failure to instruct the jury on the City's non-liability under a reapondeat superior theory. It is the opinion of this Court that liability premised on this legal theory was not the basis of plaintiff's case against the City. To put it another way, plaintiff's case against the City was not based on allegations that the municipality employed a tort-feasor.

This Court considered the City's claim of prescription during the trial of

this matter, and will not address it here.

The motion presented by the five remaining defendants does not persuade this Court that a judgment notwithstanding the verdict, a new trial or a remittitur are in order. Procunier v. Navaretta, 434 U.S. 555, 561, 98 S.Ct. 855, 859, 55 L.Ed.2d 24, relied upon by the defendants as the basis for their claim to "absolute" immunity is inapposite, inasmuch as it speaks to "qualified" immunity only. Butz v. Economu, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) speaks to an adversarial setting within a federal agency and is thus distinguishable, as are Hamm v. Yeatts, 479 F.Supp. 267 (W.D. Va. 1979) (members of State Alcoholic Beverage Control Commission considered to perform function similar to judge's, in the course of on-the-record hearings) and Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (officers of the executive branch are to receive qualified immunity for acts of official conduct).

Judgment will be entered accordingly.

APPENDIX B

Henry J. Bennett, Jr.,
Plaintiff-Appellee,

v.

City of Slidell, Gerry Hinton, B.E. McDaniel, Nunzio Giordano and Patrick J. Berrigan, Defendants-Appellants.

No. 81-3236.

United States Court of Appeals,
Fifth Circuit

Feb. 7, 1983.

Liquor license applicant brought action against city and city officials to recover damages arising out of delays experienced in securing a liquor license and occupancy permit for his lounge. The United States District Court for the Eastern District of Louisiana, George Arceneaux, Jr., J., 518 F. Supp. 59, entered judgment against city, and defendants appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) individual city councilmen could not be held liable to applicant for delays in securing a liquor license and occupancy permit, since there was no credible evidence that council members voted on the application for any reason other than those patently apparent, and applicant's evidence fell far short of proving a conspiracy among the councilmen, mayor, city attorney and city building inspector

with respect to the liquor license application, and (2) city could be held liable to applicant for delays experienced by applicant in securing a liquor license and occupancy permit, since there was evidence that city building inspector acted with sufficient authority to qualify as city official within intendment of civil rights statute and that he applied zoning ordinance in an unconstitutional manner, thus violating applicant's due process and equal protection rights.

Affirmed in part and reversed in part.

Lawrence D. Wiedemann, Allain F. Hardin, New Orleans, La., for Gerry Hinton, et al.

Lloyd R. Walters, Slidell, La., for City of Slidell.

David W. Oestreicher, II, New Orleans, La., Fernando J. Estopinal, III, Slidell, La., for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GARZA, POLITZ and WILLIAMS, Circuit Judges.

POLITZ, Circuit Judge:

Invoking 42 U.S.C. §1983, Henry J. Bennett, Jr., sought damages from the City of Slidell, its council members, mayor, chief administrative officer, and city attorney, for delays experienced in securing a liquor license and an occupancy

permit for his lounge in Slidell, Louisiana. The jury returned a verdict against the city for $20,000.00, against city attorney Patrick J. Berrigan for $1,000.00, and against councilmen Gerry G. Hinton, B. E. McDaniel and Nunzio Giordano for $1,000.00 each. The trial judge denied defendants' motion for judgment n.o.v. or, alternatively, for remittitur or new trial. 518 F.Supp. 59. Concluding that the evidence does not support judgment against the councilmen, we reverse as to them. We affirm the judgment against the City of Slidell and Berrigan.

Facts

From 1972 until May, 1975, Bennett operated a lounge in Slidell, Louisiana, known as "Fooser's Den." Thereafter, he leased, with option to buy, the premises at 3745 Pontchartrain Drive, Slidell. Bennett planned to open a lounge to be known as "Club Rustique." During early June, 1975, John Coerver, who was the owner of property adjoining 3745 Pontchartrain Drive and Auditor for the City of Slidell, made known to Bennett his intention to oppose the lounge. In doing so, Coerver emphasized his influence in the city and his intent to use that influence.

On June 11, 1975, Bennett applied for a building permit in order that he might begin repairs and renovations of the proposed lounge. This permit was issued shortly thereafter by Bill Dugas, the city building inspector. Typically, once the necessary repairs and additions were made

and an application submitted, the occupancy permit would have been routinely issued.

On July 7, 1975, Bennett applied to the city council for a liquor license. The application conformed to law but was not acted on by the council until its meeting on August 12. In the interim, the council received a letter from Coerver objecting to Bennett's application. At the meeting, a question was raised whether the liquor license should be issued before Bennett obtained an occupancy certificate. The question was not resolved. A resolution to issue the permit was defeated by the nay votes of Giordano, Hinton and McDaniel.

On August 21, 1975, Coerver again wrote the city council, this time objecting to issuance of an occupancy permit to Bennett. Again purporting to write for the adjacent property owners, Coerver stated: "We...are requesting...the complete parking area of this establishment be surfaced with a minimum of four inches of concrete or similar all-weather surface as specified in Section 4.1 of the Zoning Ordinance of Slidell, Louisiana.

On August 22, 1975 Bennett filed suit against the city seeking an order mandating issuance of the liquor license. The council immediately met in special session and determined to defer action on his application pending resolution of the litigation. However, one month later, on September 23, 1975, the council met and issued the liquor license. Bennett's efforts to secure the occupancy permit

continued to be unsuccessful.

Bennett testified that Dugas had informed him that oyster shells could be used for the surface of the parking lot. Other business places had shells in their parking areas despite the dictates of Ordinance 795. Bennett put shells on his parking area. Dugas denies telling Bennett that a shell surface would be considered adequate compliance with the ordinance, but conceded that other businesses had shell-surfaced parking lots.

Sometime prior to November 14, 1975, Dugas was ostensibly informed by an assistant that Bennett was using the building at 3745 Pontchartrain Drive despite the fact that no occupancy permit had been issued. Without investigating or otherwise confirming the accuracy of the information, Dugas notified Central Louisiana Electric Company (CLECO), by letter dated November 14, 1975, that Bennett was using the leased premises illegally. Five days later Berrigan, as city attorney, at Dugas' behest, wrote CLECO a letter which purported to give the utility "authority to disconnect electric power at The Club Rustique, 3245 [sic] Ponchartrain Drive, presently occupied by Henry Bennett." In response, CLECO discontinued electrical service.

Bennett ultimately paved the parking lot. In November, 1975, two months after the grant of his liquor license, he received the occupancy permit.

On April 1, 1976, Bennett initiated the instant suit under 42 U.S.C. §§1983

and 1985. The city's motion to dismiss for failure to state a claim under Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), was granted. In June 1979, Bennett moved for reinstatement of the city consistent with the intervening teachings of Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Reinstatement was allowed and, ultimately, the jury returned verdicts under §1983 as noted. Bennett's §1985 conspiracy claim was rejected.

Limitations

[1] The first issue raised by the city requires scant discussion. The city maintains that the limitation period for Bennett's suit expired between the time of the city's dismissal from the suit and the later reinstatement. The city errs in its reasoning.

Aside from the fact that during the course of this litigation--after the trial court ordered the dismissal of the city and before the motion to reinstate was granted--the law regarding the liability of a municipality under §1983 changed dramatically, with Monell overruling Monroe v. Pape, the city's argument is without merit. Under McDermott v. Crown Zellerbach Corp., 418 F.2d 598 (5th Cir. 1969), and Carver v. Liberty Mut. Ins. Co., 277 F.2d 105 (5th Cir. 1960), Bennett's suit against Berrigan and the city councilmen individually tolled the running of the statute of limitations against the city, since they were potential obligors bound in solido with

the city. In addition, we note no prejudice by the reinstatement in 1979. See Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980). Bennett's claim was presented against the city seasonably.

Liability of Councilmen

[2] The imposition of liability upon the individual councilmen presents an issue of substantial consequences. The three council members were cast in judgment because of their votes to deny Bennett's liquor license until he secured an occupancy permit, and their apparent failure to initiate an inquiry into Dugas' decision to withhold the occupancy permit until the requisites of Ordinance 795, as respects parking surfaces, were complied with. The record contains no credible evidence that the council members voted for any reason other than those patently apparent. Further, the record reveals that the individual councilmen did not direct Dugas' day-to-day operation. Rather, the council was in the position to review Dugas' decisions of an appeal was made to it. Bennett never appealed Dugas' rejection nor did he complain to the councilmen about the delay.

A painstaking review of the record discloses insufficient evidence to warrant submission of the question of the liability of the councilmen to the jury. Bennett's evidence falls far short of proving a conspiracy among the councilmen, mayor, city attorney and city building inspector with respect to the liquor license application. And the council never acted with respect to the occupancy

permit. Hinton, McDaniel, and Giordano were entitled to judgment dismissing the demands against them as a matter of law.

Liability of the City

[3] We affirm the judgment against the city because of the evidence that Dugas acted with sufficient authority to qualify as an official within the intendment of §1983, and that he applied the zoning ordinance in an unconstitutional manner, thus violating Bennett's due process and equal protection rights. See Monell and Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).

Dugas admitted that other establishments similar to the "Club Rustique" operated in violation of the parking lot paving requirement, but denied that Coerver's complaints influenced his decision to give the ordinance strict application in Bennett's case.

Nevertheless the city contends that holding it liable for Dugas' discriminatory enforcement of the zoning ordinance is not permissable under Monell since to do so would visit liability on a respondeat superior theory. We do not agree.

The rule of Monell is clear: "A local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly

be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." 436 U.S. at 694, 98 S.Ct. at 2037. We view this case as fitting within these confines. Dugas held the position of city building inspector. Berrigan was the city attorney. The record demonstrates that Dugas acted with official power in passing on occupancy certificate applications. He had been vested with this authority. The city building inspector's primary responsibility was to make certain that buildings complied with local ordinances; the means of carrying that responsibility out were through the issuance or denial of occupancy permits. It was precisely within this framework that the building inspector acted to deny plaintiff his constitutional rights. For whatever reason, be it political influence of Coerver or some other motive, Dugas singled out Bennett's occupancy application for a strictissimi application of Slidell's zoning ordinance--while ignoring the existence of similar violations in other parts of the town. Further, Dugas and Berrigan, acting in their capacity as city officials, secured the disconnecting of Bennett's electric power without notice or a hearing. This situation comes within the principle outlined by the Supreme Court in Owen:

> In this circumstance--when it is the local government itself that is responsible for the constitutional deprivation--it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government, rather than to let the entire burden fall on

the injured individual.

445 U.S. at 655 n.39, 100 S.Ct. at 1418 n. 39.

City Attorney

[4] Berrigan claims that he was entitled to immunity from the §1983 suit. We disagree. Berrigan was not acting as a prosecutor, Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), as a legislative council, Green v. DeCamp, 612 F.2d 368 (8th Cir. 1980), or as a legislator, Lake Country Estates, Inc. v. Tahoe Regional Planning Agency. He is not entitled to immunity in this action.

Rebuttal Witness

[5] As a final consideration, we discern no merit in the appellant's argument tht the district court committed reversible error in denying them the opportunity to present a rebuttal witness. The stated purpose of the rebuttal witness was to show that Bennett was operating his lounge prior to obtaining his occupancy permit, an infraction which purportedly led to the disconnection of power. In refusing to allow the testimony of the tendered rebuttal witness, the trial judge observed that the witness was not listed in the pretrial order and that he was not a "rebuttal witness in the sense of what the rules contemplate a rebuttal witness to be." We will not disturb the district judge's ruling absent a showing of clear abuse of the broad discretion vested in

the trial court by Rule 16 of the Federal Rules of Civil Procedure. Davis v. Duplantis, 448 F.2d 918 (5th Cir. 1971).

The judgment against Hinton, McDaniel and Giordano is REVERSED and judgment is entered dismissing all claims against them. The judgment against Berrigan and the City of Slidell is AFFIRMED at their cost.

APPENDIX C

Henry J. Bennett, Jr.,
Plaintiff-Appellee

v.

City of Slidell, Gerry Hinton, B.E. McDaniel, Nunzio Giordano, and Patrick J. Berrigan, Defendants-Appellants.

No. 81-3236.

United States Court of Appeals,
Fifth Circuit.

April 2, 1984.

Builder brought action against city and city building inspector under civil rights statute for damages caused by prejudicial treatment at hands of city attorney and building inspector. The United States District Court for the Eastern District of Louisiana, George Arceneaux, Jr., J., 518 F. Supp. 59, entered judgment in favor of builder, and city and building inspector appealed. The Court of Appeals, 697 F.2d 657, affirmed in part and reversed in part in a panel opinion. On rehearing en banc, the Court of Appeals, Reavley, Circuit Judge, held that city could not be held liable for delays of builder's liquor license and occupancy permit and termination of his electric service at instances of city attorney and building inspector.

Affirmed in part; reversed in part.

Garwood, Circuit Judge, filed concurring opinion.

Politz, Circuit Judge, filed dissenting opinion in which Garza, Tate, Johnson and Jerre S. Williams, Circuit Judges, joined.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, BROWN, GEE GARZA, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges.

REAVLEY, Circuit Judge:

Our question is whether the City of Slidell has 42 U.S.C. §1983 liability under Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), for the conduct of two of its employees. The City has been held liable for damages to Henry Bennett caused by prejudicial treatment at the hands of the city attorney and building inspector. We hold that the City is not liable.

1. The Case Below

Bennett's complaint is the delay of a liquor license and occupancy permit, which were required for the operation of his lounge, the Club Rustique, in Slidell. Under Louisiana law liquor licenses are issued by the city council. The Slidell city attorney, Patrick J. Berrigan, was slow to complete his review of the liquor license application and then advised

council delay because of a legal question. The city building inspector, Bill Dugas, refused to issue the certificate approving premise compliance with city standards until Bennett had blacktopped a parking area of proper size, a city code requirement which was not uniformly enforced. At the instance of Berrigan and Dugas the electric service to the premises was discontinued for a time. The motivation for this unfair treatment was the opposition to Bennett's lounge from the owner of the adjacent property, who was also the city auditor and who boasted openly of his influence.

Bennett sought monetary damages by this suit under 42 U.S.C. §§ 1983 and 1985, contending that the City and its officers deprived him of constitutionally protected rights to due process and equal protection. A jury found no conspiracy among the defendants but did find that the City acted outside lawful authority and deprived Bennett of a property interest without due process of law. The same findings were made against Berrigan and three members of the city council. Dugas was not sued. The city was assessed $20,000.00 and the individuals $1,000.00 each. The district judge denied the post-trial motions of defendants. Bennett v. City of Slidell, 518 F.Supp. 59 (E.D. La. 1981). A panel of this court upheld the liability of the City and Berrigan but reversed as to the council members Bennett v. City of Slidell, 697 F.2d 657 (5th Cir. 1983). At the outset we reinstate the panel holding on all issues except that of the liability of the City.

[1] 2. City Liability and the Unsettled Contour

Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured...

Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), held that a municipal corporation was not a "person" within the meaning of this act. This holding was overruled in Monell, and now the governmental entity itself may be subjected to monetary as well as declaratory and injunctive relief. The Court in Monell held that local governments may be the targets of a §1983 action where official policy or governmental custom is responsible for a deprivation of rights protected by the Constitution, but it rejected governmental respondeat superior liability under §1983. The Court summarized its holding:

> We conclude, therefore, that a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy,

> inflicts the injury that the government as an entity is responsible under §1983.

436 U.S. at 694, 98 S.Ct. at 2037-38. The Court repeated this statement in Owen v. City of Independence, 445 U.S. 622 633, 100 S.Ct. 1398, 1406, 63 L.Ed.2d 673 (1980), where the Court held that a municipality may not assert the good faith of its officials as a defense to its own liability.

In both Monell and Owen there was no question but that the objectionable conduct was city policy. No one challenged the assertion, in Monell, that the City of New York had maintained a policy which compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. In Owen official actions of the city council itself injured plaintiff's reputation without due process of law. There has been no occasion for the Court to address "what the full contours of municipal liability under §1983 may be," as it said in Monell, 436 U.S. at 695, 98 S.Ct. at 2038. One of the unsettled questions is the identification of "those whose edicts or acts may fairly be said to represent official policy." Where the governing body itself does not commit the act or promulgate the policy or countenance the custom, under what circumstances will the conduct or policy or custom of an agent subject the city to liability? When that question is answered, the disposition of the present case as well as many others will be altered and perhaps simplified.

3. Contours Under Veil

The district judge indicated during the trial that the City of Slidell would be bound if Dugas was acting pursuant to his city authority. No instructions were given the jury relative to the proof required to find the City liable, as distinguished from the elements of plaintiff's case against each of the individual defendants. In his order denying the City's post-trial motions, the judge justified the City's liability on two grounds: that unequal application of the building code by Dugas was pursuant to municipal custom or usage, and that the denial of the occupancy permit by Dugas represented official policy inasmuch as his decisions were never questioned. 518 F.Supp. at 60. The judge's difficulty at this point is easily understood when the various writings of this and other courts of appeals are considered. The panel of this court, in affirming the City's liability, said that Monell was satisfied because Dugas and Berrigan acted as officials within their authority. The court quoted an often cited article that seems to equate the policies of a city employee, if within the authority of his employment, with city policy. 697 F.2d at 661 n.11, citing Schnapper, Civil Rights Litigation After Monell, 79 Colum.L.Rev. 213 (1979).

We stated in Schneider v. City of Atlanta, 628 F.2d 915 (5th Cir. 1980), that in those areas where a city officer "is the final authority or ultimate repository of [city] power his official conduct and decisions must necessarily be considered those of one 'whose edicts or

acts may fairly be said to represent official policy' for which the [city] may be held responsible under §1983." Id. at 920. The Schneider court was quoting from Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980), where the governmental officer in mind was one elected directly by the people and whose authority was derived by office and state law and not from another governing body. In Bowen v. Watkins, 669 F.2d 979, 989-90 (5th Cir. 1982), however, citing Schneider, the court again emphasized the matter of final authority (though subject to that of the governing body) as the touchstone of government policymaking. Other circuits hav followed this rationale: E. g., Rookard v. Health and Hospitals Corp., 710 F.2d 41, 45 (2d Cir. 1983); McKinley v. City of Eloy, 705 F.2d 1110, 1116 (9th Cir. 1983); Berdin v. Duggan, 701 F.2d 909, 914 (11th Cir.). cert. denied,--U.S.--, 104 S.Ct. 239, 78 L.Ed.2d 230 (1983); Williams v. City of Valdosta, 689 F.2d 964, 969 (11th Cir. 1982); Hearn v. City of Gainesville, 688 F.2d 1328, 1334-1335 (11th Cir. 1982). See Goode, The Changing Nature of Local Governmental Liability Under Section 1983, 22 Urb.L.Ann. 71, 90 (1981). Still other courts have attributed to the city government the conduct of its senior employees. Turpin v. Mailet, 619 F.2d 196, 201 (2d Cir. 1980) ("where senior personnel have knowledge of a pattern of constitutionally offensive acts by their subordinates but fail to take remedial steps, the municipality may be held liable for a subsequent violation if the superior's inaction amounts to deliberate indifference or to tacit authorization of the offensive acts"), cert. denied, 449

U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980); Hays v. Jefferson County, 668 F.2d 869, 975 (6th Cir. 1982) (failure of chief of police or assistant chief would be failure of county).

4. Countours Better Defined

[2] If a city may be liable only where the injury inflicted in the execution of city policy, the complainant must identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy. Plaintiff must, of course, prove that his injury was caused by city policy. We deal here with how policy may be attributed to the city.

a. City Policy (of City's Governing Body)

[3-5] The interference with the rights of the plaintiff must be due to a violation for which the city government itself is responsible. Usually a council or commission will be the governing body to which responsibility must be attached. The council may violate rights of people by direct orders or by setting a course of action for city employees which, when followed by city employees, interferes with someone's rights. The council may set a course of action by its own promulgation or by the acceptance of a course set or conducted by city employees. In any event the course of conduct, whether formally declared or informally accepted, must be the policy of the city government if it is to be the basis of

city liability.

[6] We view custom to be one form which policy takes and by which it is proven, and we use "policy" to include the pattern of conduct in actual practice that may be called "custom." Section 1983 itself uses "custom" and "usage" in describing the aegis of state law under which a person must have acted to be subject to §1983 liability. Our present inquiry is a different matter. We assume here that the city government, where it acted, did so under color of state law. Our question is whether the city was the person who acted to inflict the wrong. And we read the Supreme Court to require that the offending policy (including policy embodied in custom) be the policy or custom of the city government, i.e., the governing body which acts for the city, if that city is to be subject to liability as an actor under §1983. The Court in Monell rejected vicarious liability of the governing body of the city and concluded that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." 436 U.S. at 691, 98 S.Ct. at 2036.

[7-11] The Supreme Court in Monell wrote that practices of officials may become "so permanent and well settled as to constitute a 'custom or usage' with the force of law." 436 U.S. at 690-91, 98 S.Ct. at 2036 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68, 90 S.Ct. 1598, 1613-14, 26 L.Ed.2d 142 (1970). In Adickes, a white school teacher was denied service at a lunch

counter because she was in the company of blacks. The Court held that Adickes presented evidence of a claim under §1983 for a deprivation of rights because service was refused under color of law, i.e., a state-enforced custom of segregation in public eating places. Adickes, 398 U.S. at 173-74, 90 S.Ct. at 1617. In describing "custom or usage," the Court used such phrases as "persistent and widespread...practices," "systematic maladministration" of the laws, practices that are "permanent and well settled," and "deeply embedded traditional ways of carrying out...policy." Id. In the context of the question of city liability for such persistent conduct of its employees, i.e., conduct that has become a traditional way of carrying out policy and has acquired the force of law, the persistent conduct must be attributable to the source of policy or law of the city, its governing body. For example, in a Tenth Circuit case the county's maintenance of substandard detention facilities for the mentally ill, after attention of the county commissioners had been repeatedly called to the inadequacy of the facilities, constituted custom or policy of the county. Littlefield v. Deland, 641 F.2d 729 (10th Cir. 1981). Sufficient duration or frequency of abusive practices, or other evidence, must warrant a finding of knowledge on the part of the governing body that the objectionable conduct has become customary practice of city employees. Where the violations are flagrant or severe, the fact finder will likely require a shorter pattern of the conduct to be satisfied that diligent governing body members would necessarily have learned of the

objectionable practice and acceded to its continuation. Knowledge of a continuing practice of city employees may be attributed to the governing body in one of two ways. Actual knowledge may be shown by such means as discussions at council meetings or receipt of written information. Constructive knowledge may be attributed to the governing body on the ground that it would have known of the violations if it had properly exercised its responsibilities, as, for example, where the violations were so persistent and widespread that they were the subject of prolonged public discussion or of a high degree of publicity.

b. City Policy (of Policymaking Official)

[12,13] The Supreme Court in Monell, expressly stated that the city policy, for which the city may suffer liability, may be made by city lawmakers "or by those whose edicts or acts may fairly be said to represent official policy." We do not read the Court's words here to declare that any city official's edicts or acts would render the city liable in any case where a fact finder chose to say, speaking fairly, that the edicts or acts were official policy. The Court intended there to be a legal perimeter for city liability, which was not to include responsibility for the edicts or acts of its employees, whatever their rank, unless in accord with city policy. Liability must rest on official policy, meaning the city government's policy and not the policy of an individual official. The policy is that of the city, however, where it is made by an official under authority

to do so given by the governing authority. Hence, culpable policy is attributable to the governing body of the city where the policy was made by an official to whom the governing body had given policymaking authority.

[14,15] But policymaking authority is more than discretion, and it is far more than the final say-so, as a matter of practice, on what water main will be replaced today and whether a building meets city construction standards. City policymakers not only govern conduct; they decide the goals for a particular city function and devise the means of achieving those goals. Policymakers act in the place of the governing body in the area of their responsibility; they are not supervised except as to the totality of their performance. The governing body retains the prerogative of the purse and final legal control by which it may limit or revoke the authority of the official. The relinquishment of policymaking and supervision by the governing body is much more likely to exist, and be necessary, as the size and complexity of the government increases.

[16,17] The governing body may delegate policymaking authority in either of two ways. It may delegate policymaking power by an express statement, by a job description or by other formal action. Or it may, by its conduct or practice, encourage or acknowledge the agent in a policymaking role. In either case, the delegation of policymaking authority requires more than a showing of mere discretion or decisionmaking authority on the part of the delegee. See Brewer v.

Blackwell, 692 F.2d 387 (5th Cir. 1982) (town not liable for its police chief's conditioning release of prisoner upon execution of hold-harmless agreement, in absence of evidence that the requirement was pursuant to municipal policy or custom); Berry v. McLemore, 670 F.2d 30 (5th Cir. 1982) (chief of police struck and shot plaintiff in course of arrest for traffic offense; town not liable because no municipal policy authorized or encouraged the use of excessive force in making arrests). The governing body must expressly or impliedly acknowledge that the agent or board acts in lieu of the governing body to set goals and to structure and design the area of the delegated responsibility, subject only to the power of the governing body to control finances and to discharge or curtail the authority of the agent or board.

5. City of Slidell Outside the Contours

[18] Bennett alleges that the delays of his liquor license and occupancy permit and the termination of his electric service were the result of official city policy. The trial judge cited two grounds to support Bennett's contention: first, the city maintained a "custom or usage" of unequally applying the building code; and second, Dugas' authority to issue or deny occupancy permits was never questioned by the council members and thus represented official policy of the city. Bennett, 518 F. Supp. at 60. We disagree. Under the record there is no legal basis for city liability.

We may first look for the city

policymaker in Slidell. Were the city attorney and building inspector given policymaking authority? If so, it would be to them we would look to see if either had promulgated an express policy or acceded to a persistent practice which led to plaintiff's injury. But neither of city employees had any policymaking authority. The city attorney was employed only to give legal advice. The building inspector's job was to execute or administer the city policy, established by the city council in its building code. He obtained his authority from the chief administrative officer of the city. His decisions were appealable to the board of zoning adjustments and to the city council. His decisions were perhaps discretionary and ministerial, but he had no authority to act in lieu of the council to set or modify city policy.

We then look to the city council alone as the Slidell policymaker. The council declared no policy about which complaint can be made. That leaves us with the question of whether there was a persistent practice of unequal application of the law in this city for which we can attribute responsibility to the city council.

Other than the fact that plaintiff in this case suffered some delay after an objector to the lounge threatened to exercise influence against him, there is no evidence at all in this record that a persistent practice existed in Slidell by which some builders were favored over others. Dugas, who suffered from a heart condition and testified by deposition, said that it was his opinion that shells

constituted a needed foundation where there was quicksand in the soil in Slidell and that, while he was building inspector, he preferred to allow some establishments to operate with shells and without paving. However, where a complaint was made, as it was in the present case, he applied the letter of the building code and required paving or black-topping. There is no evidence of persistent favoritism. The employee, Dugas, deviated from the established procedures and, on his own, allowed exceptions to the building code unless someone complained. If Bennett suffered unequal treatment, it may have been due to the complaint and not to a practice by Dugas that unequally treated individual builders. And even if Dugas did treat Bennett differently or, "in a number of cases around Slidell" (as he said), allowed use of shells, there was no evidence that this was a course of conduct attributable to the city council. Bennett neither alleged nor proved any unconstitutional custom known by or attributable to the governing body of Slidell. His complaint (filed prior to Monell and never amended) alleged that city employees (and certain now absolved councilmen) violated his rights, for which the city was liable. Bennett may have been injured by Dugas and Berrigan; he was not injured by the City of Slidell.

The judgment against Berrigan is affirmed. Otherwise, the judgment is reversed. Costs of this appeal are to be borne by the plaintiff.

AFFIRMED in part. REVERSED in part.

GARWOOD, Circuit Judge, concurring:

I concur in Judge Reavley's opinion. I merely add that in my view this case does not present, and I do not believe we reach, the qestion of whether there may be instances in which it would be inappropriate to impose on the city a purely vicarious responsibility under section 1983 for the wrong even of a truly policy-making official acting within the scope of the authority delegated him by the city's governing body--for example, an instance of highly unusual action, of a type not reasonably forseeable for the governing body, which it takes prompt steps to correct.

POLITZ, Circuit Judge, with whom GARZA, TATE, JOHNSON and WILLIAMS, Circuit Judges, join, dissenting:

"Difficult questions nevertheless remain for another day. There are substantial line-drawing problems in determining 'when execution of a government's policy or custom' can be said to inflict constitutional injury such that 'government as an entity is responsible under §1983.'" Monell v. Department of Social Services, 436 U.S. 658, 713, 98 S.Ct. 2018, 2047, 56 L.Ed.2d 611, 649-50 (1978) (Powell, J., concurring). For us, today is one of those other days. We are keenly aware of the accuracy of Justice Powell's prediction. There are substantial line-drawing problems indeed.

I agree with much of that written by my brother Reavley, but I cannot agree with the majority's holding that the actions of city building inspector Dugas and city attorney Berrigan, within the context of the facts of this case, are not

acts of those who "may fairly be said to represent official policy." Monell, 436 U.S. at 694, 98 S.Ct. at 2037. By today's opinion the majority permits municipalities effectively to immunize themselves from §1983 damage liability for the unconstitutional actions of their appointed officials merely by articulating facially constitutional policies in the substantive areas in which the officials perform their delegated duties. I cannot agree with this unduly restrictive view of Monell.

The issue presented in this case, as I perceive it, is whether a municipality may be held accountable in damages under §1983 for the unequal and, thus, unconstitutional enforcement of its facially valid ordinance by an appointed official to whom the city has delegated final authority for interpretation and enforcement. I see both factual and legal questions. The jury implicitly and the trial court expressly made factual findings upon which they predicated the City of Slidell's liability. There need be no citation of authority for the statement that these factual findings are to be upheld on appeal unless shown to be clearly erroneous and without record support. I accept the facts and proceed directly to the legal issue.

Monell teaches that under §1983 a municipality must respond in damages for constitutional injuries resulting from the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." Monell, 436 U.S. 694, 98 S.Ct. at 2037.

The majority opinion giveth but immediately taketh away. Although it acknowledges that official policy can be made by a city official pursuant to delegated authority, it relieves the city of §1983 liability whenever the city's official substantive policy, as set forth in a written ordinance or as formally adopted by the city's lawmakers, is facially constitutional. In essence, the majority holds that any action by an appointed official, inconsistent with the city's written ordinance, is an aberrant act attributable only to that official, and such action can never constitute official city policy within the meaning of Monell. This restrictive interpretation of Monell effectively negates the possibility that municipal liability will ever be imposed for the unconstitutional actions of an appointed official. Indeed, under the contours defined by the majority, the instances in which any edict or act of any person not a "lawmaker" may "fairly be said to represent official policy," will seldom arise. That result is totally at odds with Monell's mandate that municipalities be subjected to §1983 liability for more than the mere written words of their ordinances. As Justice Frankfurter recognized in Nashville C. & St. L.R. Co. v. Browning, 310 U.S. 362, 269, 60 S.Ct. 968, 972, 84 L.ED 1254 (1940), quoted in Monell, 436 U.S. at 691 n. 56, 98 S.Ct. at 2036 n. 56:

> It would be a narrow conception of jurisprudence to confine the notion of "laws" to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice...can

> establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy...are often tougher and truer law than the dead words of the written text.

I read Monell to extend substantially farther than the execution of a formally adopted or announced policy that is unconstitutional on its face. Indeed, it must do so if Monell's prescription of municipal liability is to have any meaningful application whatsoever.

Under the majority's formulation, a city is only responsible for the unconstitutional enforcement of a facially constitutional ordinance when it is established that the aberrant conduct was so notorious that it can only be assumed that the city lawmakers tacitly approved the wrongful act. That proposition emasculates Monell. Corporate bodies, such as municipalities, act only through natural persons. It is through the actions of such persons that laws are promulgated and policies are formally articulated. And it is only through the actions of such persons that official power and authority may be exercised and official policies and customs may be enforced. The rule of Monell must be interpreted to encompass the execution of governmental policy or custom, whether de jure, made the lawmakers, or de facto, the acts of those clothed with the city's power and authority in a given situation. The first category poses little difficulty; one need only look to see if

the city has formally ordained an unconstitutional policy. One rationally expects to find little in this search. It is the second category that is problematic, however, and it is into that foggy swampland that the present case calls us.

Bill Dugas, usually referred to as the city building inspector, was chief of the Office of Permits and Inspections. He was appointed by elected city officials and was delegated specific enforcement authority by the Zoning Ordinance of the City of Slidell. Section 3.201 of that ordinance creates Dugas' position and delegates his authority:

> For the purpose of administering and enforcing this ordinance there is hereby created an Office of Permits and Inspections. The chief of this office, who shall be appointed by the president of the City Council with the approval of the Council, shall be charged with the responsibility of administering and enforcing the provisions of this ordinance.

Section 3.302 delegates to the building inspector the power to enforce the zoning ordinance through the granting or denying of occupancy permits.

> It shall be unlawful to install permanent utilities in or to use or occupy or permit the use or occupancy of any part of any building or premises hereafter erected, created, changed, converted, or wholly or partly altered or enlarged in its use or structure until a certificate of

> occupancy shall have been issued therefor by the administrative official stating that the proposed use of this building or land conforms to the requirements of this ordinance.

One of the substantive provisions that Dugas was empowered to enforce relates to the surfacing of off-street parking facilities for businesses. Section 4.1 of the zoning ordinance requires that such parking lots "be surfaced with a minimum of four (4) inches of concrete or similar all-weather surface." Bennett asserts that when he first spoke to Dugas about remodeling the premises for the lounge he requested and was given permission to surface the adjacent lot with shells. Dugas denies having given this verbal authorization but concedes that he allowed several other business establishments in Slidell to surface their parking lots with shells. The cost of a layer of shells is markedly less than the cost of four inches of concrete.

I view the evidence as did the trial judge and jury. Dugas declined to authorize Bennett's ues of a shell surface because of the intervention of John Coerver. Coerver, who was the City Auditor and an influential man in Slidell, lived near Bennett's lounge. He warned Bennett of his influence with city authorities and of his intention to use that influence to prevent Bennett from opening the lounge. Coerver did not speak idly. He made known to Dugas his objection to the lounge. As a direct result, Dugas refused to issue an

occupancy permit until Bennet incurred the additional expense of laying four inches of concrete over the parking area. Action on Bennett's application for a liquor license was shelved because Bennett did did not have an occupancy permit. In the meantime, Dugas and the city attorney "officially" acted to give the local utility company "authority to disconnect electrical power" at the lounge. See panel opinion, 697 F.2d 657, at 659.

Although the zoning ordinance provides for administrative review of Dugas' interpretation and enforcement of the ordinance, the record reflects that Dugas' decisions to grant or deny occupancy permits were never challenged. Dugas' decisions were final. His actions were the alpha and omega of the interpretation and execution of the city's official policy in this area.

The majority shields the city from §1983 liability for Dugas' unconstitutional enforcement of the zoning ordinance on the ground that elected city officials did not authorize Dugas to make official city policy. I cannot concur in the broad sweep of that reasoning. Dugas could and did speak for the city on a matter of city policy. By formal action of the city council he was designated the primary authority to interpret and enforce the zoning ordinance. In fact, under the ordinance Dugas was the sole repository of city authority to grant or deny occupancy permits. Indeed, this delegation to Dugas was a major part of the city's zoning policy. Dugas' interpretation and enforcement of the ordinance therefore constituted the execution of official city

policy. His actions were final and binding. The ordinance provided for an appeal to the Board of Adjustment and thereafter to the courts, but the anecdotal evidence reflects that no such appeal was ever taken. Dugas' unequal enforcement of §4.1 fits perfectly within Monell's prescription for §1983 municipal liability where the "execution of a government's policy...by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Monell, 436, U.S. at 694, 98 S.Ct. at 2037.

The majority cites this court's decisions in Schneider v. City of Atlanta, 628 F.2d 915 (5th Cir. 1980) and Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982). I find both cases supportive of the conclusion that the City of Slidell is liable for Dugas' unconstitutional acts. For example, Judge Wisdom wrote in Bowen:

> When an official has final authority in a matter invovling the selection of goals or of means of achieving goals, his choices represent governmental policy...If a higher official has the power to overrule a decision but as a practical matter never does so, the decisionmaker may represent the effective final authority on the question.

Id at 989. See also Schnapper, Civil Rights Litigation After Monell, 79 Colum.L.Rev. 213, 218 (1979).

Notwithstanding the constitutionally neutral language of the zoning ordinance, Dugas' duties were not merely ministerial,

as the majority suggests. Rather, through the exercise of his unbridled authority to enforce the zoning ordinance as he saw fit, Dugas was empowered with de facto final authority to select goals and to devise the means of achieving those goals. Under Bowen, then, Dugas' acts represented official governmental policy within the meaning of Monell.

An appointed city official may be the final authority with respect to a specific policy without being the ultimate authority. It is at this point that I differ most with the majority. In my view, if an official is delegated the authority to act on behalf of the city in situations requiring the exercise of discretion, and if the decisions made by that official within the scope of his authority end the matter unless and until something else is specifically initiated (such as a formal appeal of the official's decision), then that official is one "whose edicts or acts may fairly be said to represent offical policy" within the intendment of Monell. City policy may result from the exercise of either de jure or de facto final authority. The mere fact that the official's acts are inconsistent with the city's facially constitutional ordinance cannot and should not be sufficient to immunize the city from §1983 liability under Monell.

Finally, today's decision and the Supreme Court's decision in Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) are the proverbial lion and lamb. Can they coexist? The Supreme Court held in Owen that a city may be held accountable under

Monell for the unconstitutional acts of appointed officials even if the officials enjoy individual immunity from §1983 liability. See Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.895 (1978) and authorities cited therein. Under today's ruling, as long as the language of the city's written ordinance is consistent with constitutional norms, a victim of an unconstitutional application of that ordinance will have the Hobson's choice of suing either an immune city of an immune and/or judgment-proof official. I do not believe that the Forty-second Congress raised such an impenetrable shield against a victim of constitutional injury when it adopted section one of the 1871 Civil Rights Act with the intention of throwing open the doors of the federal courts to protect federally created rights from official state encroachment.

Today's opinion sounds a muted death knell in this circuit for what I perceive to be the intended application of Monell. For that reason, I cannot join the majority and must respectfully dissent.

APPENDIX D

Henry J. Bennett, Jr.,
Plaintiff-Appellee,

v.

City of Slidell, Gerrry Hinton, B.E. McDaniel, Nunzio Giordano, and Patrick J. Berrigan, Defendants-Appellants

No. 81-3236

United States Court of Appeals
Fifth Circuit

July 9, 1984.

Builder brought action against city and city building inspector under civil rights statute for damages caused by prejudicial treatment at hands of city attorney and building inspector. The United States District Court for the Eastern District of Louisiana, George Arceneaux, Jr., J., 518 F.Supp. 59, entered judgment in favor of builder, and city and building inspector appealed. The Court of Appeals, 697 F.2d 657, affirmed in part and reversed in part in panel opinion. On rehearing en banc, the Court of Appeals, Reavley, Circuit Juge, 728 F.2d 762, affirmed in part and reversed in part. On petition for rehearing, the Court of Appeals reaffirmed holding an original opinion, that municipality is liable under section 1983 for deprivation of rights protected by the Constitution or federal laws only if the deprivation is inflicted pursuant to official policy.

Petition denied.

Politz, Circuit Judge, concurred in part and filed opinion, in which Garza, Tate, Johnson and Jerre S. Williams, Circuit Judges, joined.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING.

Before CLARK, Chief Judge, BROWN, GEE GARZA, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

[1] This court unanimously agrees upon the following statement:

A municipality is liable under §1983 for a deprivation of rights protected by the Constitution or federal laws that is inflicted pursuant to official policy.

[2,3] Official policy is:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official whom the lawmakers have delegated policy-making authority; or

2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a

custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.

[4] Actions of officers or employees of a municipality do not render the municipality liable under §1983 unless they execute official policy as above defined.

The majority of the court regard the foregoing statement to be in accord with the original opinion in this case and we reaffirm the further definition of the contours of city liability explained in part 4 of that opinion. Bennett v. City of Slidell, 728 F.2d 762, 767-769 (5th Cir. 1984). By that writing, inter alia, we rejected the line of authority, discussed in part 3 and represented in particular by our opinion in Schneider v. City of Atlanta, 628 F.2d 915 (5th Cir. 1980), which would permit policy or custom to be attributed to the city itself by attibution to any and all city officers endowed with final or supervisory power or authority. Only those policymakers defined in part 4 may, by their declaration of formal policy or accession to custom, subject the city to liability in the absence of such declaration or accession by the governing body itself. We affirm, however, the writing in Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980), as it relates to the officer who obtains policymaking authority by virtue of the office to which that officer is elected.

The petition for rehearing filed by the appellee is DENIED.

POLITZ, Circuit Judge, joined by GARZA, TATE, JOHNSON, and JERRE S. WILLIAMS, Circuit Judges, concur in the general statement contained in the per curiam but would grant rehearing, being convinced that Bennett was aggrieved by the official policy of the municipality for the reasons stated in the dissenting opinion.

APPENDIX E

United States Code, Title 28:

§1343(3). Civil Rights and elective franchise

The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custome or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

United States Code, Title 42:

§1983. Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Code, Title 42:

§1985. Conspiracy to interfere with civil rights.

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest,

interrupt, hinder or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness or juror

(2) If two or mroe persons in any State or Territory conspire to deter, by force, intimidation or threat, any party or witness in any Court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing or defeating, in any manner, the due course of justice to any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection

of the laws;

Depriving persons of rights or privileges:

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing him or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress of the United States; or to injure any citizen in peson or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such

conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.